APR 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DENIED 4-29-74

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,

Petitioners,

—v.—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND

BRIEF OF THE OHIO STATE UNIVERSITY COLLEGE OF LAW CLINICAL PROGRAMS, *AMICUS CURIAE*

MICHAEL E. GELTNER
ROBERT APP
Ohio State University
College of Law
Clinical Programs
1659 North High Street
Columbus, Ohio 43210
Counsel for Amicus Curiae

Assisted by:
DIXIE MOSS

INDEX

PAGE

Statement of Interest and Motion for Leave to File Brief Late as *Amicus Curiae* 1

Introduction 3

ARGUMENTS:

Impartiality 5

The Lower Court Cases 11

CONCLUSION 13

Affidavit of Service 15

TABLE OF CASES AND OTHER AUTHORITIES

Cases:

Allen v. *Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973) 3, 13

Bundy v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971) 11-12

Coffin v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) 3

Collins v. *Hancock*, 354 F. Supp. 1253 (D.N.H. 1973) 11

Clutchette v. *Procunier*, 328 F. Supp. 767 (N. D. Cal. 1971) 11

Crawford v. *United States*, 212 U.S. 183 (1909) 12

Firman v. *Cooper*, Civil No. 73-193, S.D.O., E.D. (disciplinary transfer) (decision pending) 2

Frazier v. *United States*, 335 U.S. 497 (1948) 12

PAGE

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 3, 13
Gibson v. *Berryhill*, 411 U.S. 564 (1973) 5
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 3
Gomes v. *Travisono*, 487 F.2d 1215 (1st Cir. 1973) 4
Gomes v. *Travisono*, 353 F. Supp. 457 (D.R.I. 1973), modified, 490 F.2d 1209 (1st Cir. 1973) 3, 12, 13
Gray v. *Creamer*, 465 F.2d 179 (3rd Cir. 1972) 12

Hoitt v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973) 3, 11

In re Murchison, 349 U.S. 136 (1955) 5

Jackson v. *Bishop*, 404 F.2d 571 (8th Cir. 1968) 3

King v. *United States*, —— F.2d ——, 15 B.N.A. Crim. L. Rep. 2025 (7th Cir. Mar. 17, 1974) 6

Landman v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971) 3, 11

Moore v. *Dempsey*, 261 U.S. 86 (1923) 5
Morris v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970) ..8, 11
Morrisey v. *Brewer*, 408 U.S. 471 (1972) 3

Nolan v. *Scafati*, 430 F.2d 548 (1st Cir. 1970) 3

Palmigiano v. *Baxter*, 487 F.2d 1280 (1st Cir. 1973) 4

People v. *Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956) 12

Sands v. *Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974) 3, 11

PAGE

Sostre v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972) 12

State v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), cert. den. sub nom. *Ravenell* v. *New Jersey*, 379 U.S. 982 (1965) 12

Tumey v. *Ohio*, 273 U.S. 510 (1927) 5

United States v. *Wunderlich*, 342 U.S. 98 (1951) 5

United States ex rel. Miller v. *Twomey*, 479 F.2d 701 (7th Cir. 1973) 3, 12

United States ex rel. Neal v. *Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972) 11

United States ex rel. Walker v. *Mancusi*, 467 F.2d 51 (2nd Cir. 1972) 12

Ward v. *Monroeville*, 409 U.S. 57 (1972) 5

Statute:

Administrative Procedure Act, 60 Stat. 237 (1946), as amended 5 U.S.C. §§551-59, 701-06, 1305, 3105, 3344, 6362, 7562 6

PAGE

Other Authorities:

47 Am. Jur. 2d *Jury* 3321 (1969) 12

Attorney General's Committee on Administrative Procedure, Final Report 47 (1941) 6

Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L., C. and P.S., 200 (1972) 10

Ohio Citizens Task Force on Corrections, Final Report to the Governor, D9-D10 (1971) 2

Zimbardo, *A Pirandellian Prison*, N. Y. Times, Apr. 8, 1973, Section 6, p. 38 7

Zimbardo, *The Psychological Power and Pathology of Imprisonment*, in Behavior Disorders: Perspectives and Trends 151 (Milton and Wahler eds. 1973) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,

Petitioners,

—v.—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE OHIO STATE UNIVERSITY COLLEGE OF LAW CLINICAL PROGRAMS, *AMICUS CURIAE*

Statement of Interest and Motion for Leave to File Brief Late as *Amicus Curiae*

The Ohio State University College of Law Clinical Programs is one of the oldest law school clinical programs in the United States. As part of its function of educating law students in the effective representation of individuals, it offers courses, involving both classroom instruction and representation under staff attorneys, in post-conviction remedies and representation of incarcerated persons. While the clients of the Ohio State University College of Law Clinical Programs are primarily from Ohio, it

regularly receives correspondence from inmates incarcerated elsewhere in the United States. A recurrent complaint in prisoners' correspondence is the perception that discipline is unfairly administered and, more particularly, that it functions in the interests of the prison guards and prison administrators, rather than adjudicating facts.

These recurrent complaints of "kangaroo courts" have led us to make inquiry into the impartiality with which prison discipline is administered and to appear as counsel in one case raising these issues. *Firman* v. *Cooper*, Civil No. 73-193, S.D.O., E.D. (disciplinary transfer) (decision pending).

We believe that the Court's decision in this case may have a substantial impact on the fairness of prison disciplinary proceedings in Ohio[1] and believe that this brief may aid the Court's deliberations.

Consent for the filing of this brief has been obtained both from counsel for respondent, whose position we support, and from counsel for petitioner. Through an error, we were not aware of the deadline for filing of this brief until it had passed and, as a result, leave is sought to file this brief out of time.

---

[1] To date, there has been no reported Court decision extending due process requirements to prison discipline proceedings in Ohio. A study of Ohio prisons documented the fact that disciplinary boards or "Rules Infractions Boards" were staffed by guards and guard officers, were a "significant source of inmate complaints" and were "perceived as 'kangaroo courts.'" Ohio Citizens Task Force on Corrections, Final Report to the Governor, D9-D10 (1971).

Introduction

There has been an unnecessarily long delay in implementing the axiomatic position that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin* v. *Reichard,* 143 F.2d 443 (6th Cir. 1944). See also *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968). Nevertheless, the lower federal courts, including the Eighth Circuit in this case, have finally recognized, following this Court's decisions in such cases as *Morrisey* v. *Brewer,* 408 U.S. 471 (1972) and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), that due process of law is a constitutionally mandated prerequisite to the imposition of the more severe forms of prison discpiline. See, e.g., *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey,* 479 F.2d 701 (7th Cir. 1973); *Nolan* v. *Scafati,* 430 F.2d 548 (1st Cir. 1970); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973); *Sands* v. *Wainwright,* 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974); *Allen* v. *Nelson,* 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971). The debatable—and difficult—question is just what constitutes due process in a prison.

It is the purpose of this brief to deal with one aspect of due process of law in prison disciplinary proceedings—the necessity of an impartial decision-maker. Several of the lower courts, following suggestions made in cases like *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), have adopted a flexible or "sliding scale" approach to due process of law,

keying the minimum procedural requirements to the particular deprivation before the Court. See, e.g., *Gomes* v. *Travisono*, 487 F.2d 1215 (1st Cir. 1973); *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1st Cir. 1973). The Court of Appeals' decision in this case is in that category.

It is our view, however, that at least with respect to the decision-maker, impartiality is a constant requirement of due process of law. Thus, a partial decision-maker's denial of one day's "good time" is no more acceptable than a partial decision-maker's order to spend a full year in solitary confinement. Since we intend to demonstrate *ante* that certain categories of prison personnel are necessarily partial in disciplinary proceedings involving inmates, we believe it follows that in all cases such persons are precluded from serving as decision-makers in prison disciplinary proceedings. Furthermore, while the Court has often expressed a preference for case-by-case delineation of rights, strong policies are served by a clear definition of impartiality in this case. Our observation of the slow compliance of prison administrators in Ohio with decisional trends in this Court and elsewhere convinces us that a clear decision by this Court is necessary for the Constitution to apply equally to all inmates throughout the country.

ARGUMENTS

IMPARTIALITY

The Court long ago recognized that the impartiality of the fact-finder or decision-maker is an absolute prerequisite to due process of law. See, e.g., *Moore* v. *Dempsey,* 261 U.S. 86 (1923); *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Ward* v. *Monroeville,* 409 U.S. 57 (1972). In general, it can be concluded that any conflict of interest "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the defendant" makes a potential decision-maker partial from a constitutional point of view. *In re Murchison,* 349 U.S. 136 (1955). This conflict of interest includes situations of potential economic gain, *Gibson* v. *Berryhill,* 411 U.S. 564 (1973) and situations in which the initiator of the complaint seeks to act as trier. *In re Murchison,* 349 U.S. 136 (1955). In addition, it includes the more subtle situations in which executive responsibility for a particular subject matter is inconsistent with the impartiality necessary for an adjudicatory function. *Ward* v. *Monroeville,* 409 U.S. 57 (1972). Finally, recognized loyalties to a particular group may often amount to bias. As Justice Jackson accurately observed: "[m]en are more often bribed by their loyalties and ambitions than by money." *United States* v. *Wunderlich,* 342 U.S. 98, 103 (1951) (dissenting opinion).

In general, it follows from the foregoing principles that, in a prison as in any other administrative setting, persons responsible for the particular charges, persons who have loyalties to those filing the charges or persons in

executive or operational positions should be precluded from acting as decision-makers because of the odor of bias.

An outstanding model of fairness in administrative proceedings which can serve as an analogy is the Administrative Procedure Act, 60 Stat. 237 (1946), as amended 5 U.S.C. §§551-59, 701-06, 1305, 3105, 3344, 6362, 7562. The proposals leading to its adoption recognized that the key to procedural fairness lay in impartial decision-makers and, as a result, urged absolute separation of the hearing examiners from the agencies whose cases they would decide.[2] Thereafter, this position was softened because it would be beneficial to have hearing examiners gain expertise in the subject matter of particular agencies.[3] That was the only concession made. The Administrative Procedure Act, while permitting agency appointment of hearing examiners, precludes agency control over their tenure, compensation or removal and precludes them from performing administrative functions inconsistent with their roles as impartial administrators.[4]

The Administrative Procedure Act is not, of course, applicable to state prison proceedings, although the strength of the analogy is pointed up by the recent decision of the United States Court of Appeals for the Seventh Circuit holding its provisions applicable to federal parole board proceedings. See *King* v. *United States*, —— F.2d ——, 15 B.N.A. Crim. L. Rep. 2025 (7th Cir. Mar. 17, 1974).

Applying the basic concepts of fairness expressed in the Administrative Procedure Act to the prison context, it

---

[2] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Final Report 47 (1941).

[3] *Id.* at 47.

[4] 5 U.S.C. §§3105, 7521, 5362 *formerly* ADMINISTRATIVE PROCEDURE ACT §11 (1946).

seems clear that both prison administrators and, especially, prison guards or other custodial personnel are precluded, by their functions, from being impartial decision-makers.

A recent study by a Stanford psychologist suggests that the polarization within the prison is so strong that no one in a custodial position can be presumed to be impartial toward the inmates. The study placed twenty-four Stanford "cream of the crop" students in a simulated prison atmosphere in which twelve were to assume the role of prisoners and the other twelve the role of custodial officers. Although only one-third of the guards reacted as tyrannical in their arbitrary use of power, the other two-thirds would not break rank and interfere with such activity.[8]

---

[8] Zimbardo, *The Psychological Power and Pathology of Imprisonment*, in BEHAVIOR DISORDERS: PERSPECTIVES AND TRENDS 151 (Milton and Wahler eds. 1973):

> About a third of the guards became tyrannical in their arbitrary use of power, in enjoying their control over other people. They were corrupted by the power of their roles and became quite inventive in their techniques of breaking the spirit of the prisoners and making them feel they were worthless. Some of the guards merely did their jobs as "tough but fair" correctional officers. Several were "good guards" from the prisoners' point of view, since they did them small favors and were friendly. However, no "good guard" or any other one ever interfered with a command by any of the "bad guards"; they never intervened on the side of the prisoners; they never told the others to ease off because it was only an experiment; and they never even came to me as prison superintendent or experimenter in charge to complain. In part, they were "good" because the others were "bad"; they needed the others to help establish their own egos in a positive light. In a sense, they perpetuated the prison more than the other guards because their own needs to be liked prevented them from disobeying or violating the implicit guard's code. At the same time, the act of befriending the prisoners created a social reality which made the prisoners less likely to rebel.

See also, Zimbardo, *A Pirandellian Prison*, N. Y. TIMES, Apr. 8, 1973, Section 6, p. 38.

A recent study of the effect of the decision in *Morris* v. *Travisono,* 310 F. Supp. 857 (D.R.I. 1970), validating the conclusion that prison personnel cannot function impartially in prison discipline boards. The consent decree entered in *Morris* provided that the Disciplinary Board would consist of a deputy warden and two remaining members from the custody and treatment departments. 310 F. Supp. at 872. The Harvard Center for Criminal Justice reached the following conclusions:

> "The compositional provision of the decree was subjected to substantial criticism by both staff and inmates. The staff problem of having to use classification counselors (who were also supposed to represent inmates) on the Board to meet the treatment member requirement, has already been discussed.[88] On the other hand, the inmates simply felt that the Board was unfairly constituted. In citing the composition of the Board as the most unfair aspect of the disciplinary process at the ACI,[89] the inmates characterized the board as a 'kangaroo court' and a 'biased board' which did not 'know how to be fair.' They alleged that the Board members held 'grudges' and showed favoritism, and they particularly criticized the presence of guards on the Board[90] as well as the absence of blacks, in alleging racial prejudice.
>
> The impartiality of the Disciplinary Board may be impeded by several factors. In a small, closed institution like the ACI, staff members are familiar with many of the inmates and usually bring to the Board hearings a great deal of personal knowledge about a particular inmate and sometimes bias, either favorable or unfavorable, toward him. The result often is that

the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing.[91]

Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, 'The philosophy in the past has been always back up your officers, whether they are right or wrong.' Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.

Another factor which may affect the disposition of the case is the inmate's behavior before the Board. An inmate who is 'defiant' or had a 'hard attitude' or insists on his 'rights' is unlikely to win the sympathy of the Board.

These factors affecting the Board's decisions—personal knowledge of, and sometimes bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude before the Board[92]—combine to make the prison disciplinary process something less than a hearing before impartial arbiters based only upon evidence and argument in open court.[93]

It may be that some of these problems could be solved by changing the composition of the Board.[94] The inmates interviewed had numerous suggestions for such changes: an inmate jury, one inmate on the Board, the same people on every Board, the Warden or Assistant Warden on the Board, fewer guards present, and outsiders on the Board. However, with the possible exception of including an outsider, these pro-

posals do not seem designed to create a more impartial Board. It is difficult to see how a change among prison staff would improve matters, since almost all prison personnel have personal knowledge of many of the inmates and are subject to similar pressures with regard to staff support. Even adding inmates to the Board would not remedy the problem of personal knowledge and possible bias toward the charged prisoners. While the use of an outsider would solve that difficulty (at least temporarily, *i.e.*, until he gets to know the inmates), such a move would create a whole variety of problems, some of which have already been referred to in connection with the representation issue,[95] and others of which will be discussed in more detail below.[96] "

Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L., C. and P.S., 200, 210-211 (1972) (footnotes omitted).

A further point must be added in considering the proper persons to act as decision-makers. It is clear that some aspects of procedure traditionally associated with court proceedings will be dispensed with in prison disciplinary proceedings because they are thought to be inappropriate. Others will be dispensed with because inconsistent with the prison *milieu. To the extent that traditional safeguards are dispensed with, the importance of the decision-maker in assuring fairness is magnified.*

THE LOWER COURT CASES

In general, there is neither consistency nor clarity in the recent lower court decisions considering how impartiality is to be achieved in prison disciplinary bodies. Roughly, they fall into four categories.

The first category holds, as suggested in this brief, that minimal constitutional standards exclude, in addition to participants, witnesses or persons otherwise involved and persons with a personal interest of any kind in the outcome. See, e.g., *Sands* v. *Wainwright*, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974). The logic of this position would permit persons employed by the State's penal complex, but would exclude those who serve in supervisory, treatment or custodial capacities in the particular prison.

A second category of cases insists that there be at least one truly impartial decision-maker, but permits that person to be joined in a body by more partial persons, such as wardens, guards or treatment personnel, who may constitute the majority. See, e.g., *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973); *Collins* v. *Hancock*, 354 F. Supp. 1253, 1259 (D.N.H. 1973); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

A third category dispenses with the need for an outsider to the prison, so long as the disciplinary body excludes persons who initiated the charges or participated in or witnessed the events. See, e.g., *United States ex rel. Neal* v. *Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972); *Landman* v. *Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v.

Cannon, 328 F. Supp. 165 (D. Md. 1971). A significant criticism of both the second and third categories is that, in permitting "field unit" employees to participate in disciplinary bodies, the courts authorize inclusion of persons who, in many instances would be disqualified if called to serve as one of twelve in a jury trial. A prison guard, for example, would be excluded from jury service for cause in any case in which another prison guard was a key witness or a victim or in which his role as prison guard gave him an incentive to decide in a particular way. See, e.g., *State* v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), cert. den. sub nom. *Ravenell* v. *New Jersey*, 379 U.S. 982 (1965); *People* v. *Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956); 47 Am. Jur. 2d *Jury* 3321 (1969); *Crawford* v. *United States*, 212 U.S. 183 (1909); *Frazier* v. *United States*, 335 U.S. 497 (1948).

The fourth category of cases either pays lip service to the impartiality requirement without giving it any content, see, e.g., *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701 (7th Cir. 1973), or totally disregards it. See, e.g., *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51 (2nd Cir. 1972); *Gray* v. *Creamer*, 465 F.2d 179 (3rd Cir. 1972); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

The approximate conclusion to be drawn from the cases just discussed is that the lower courts are in substantial disarray on the subject of impartiality and that it is necessary for this Court to give some guidance so that the heart of due process of law does not change markedly from place to place. Moreover, while careful recognition must be given to the exigencies of emergency situations,

see, e.g., *Gomes* v. *Travisono*, 353 F. Supp. 457 (D.R.I. 1973), modified, 490 F.2d 1209 (1st Cir. 1973), in general the lower courts have gone awry in failing to recognize the extent to which prison disciplinary proceedings are akin to other administrative proceedings. Following the principles ordinarily applicable to administrative proceedings, a much higher degree of impartiality, probably requiring an independent hearing examiner attached to the central office, would be mandated. When one considers the serious nature of consequences often imposed by prison administrative bodies, see, e.g., *Allen* v. *Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973) (long-term segregation), and the likelihood that other, traditional aspects of due process of law are to be dispensed with, cf., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the kind of impartiality ordinarily demanded of traditional administrative agencies should be the floor for due process of law in the prisons.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court find for respondents and, in the course of so finding, issue clear guidelines to require a significant degree of impartiality in prison disciplinary bodies.

Respectfully submitted,

MICHAEL E. GELTNER
ROBERT APP
Counsel for Amicus Curiae

Assisted by:
DIXIE MOSS

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

....., being duly sworn, deposes and says that on April 19, 1974, ... caused 3 copies of the attached brief of *amicus curiae* to be mailed to counsel for petitioners and 3 copies to be mailed to counsel for respondents, by depositing in a United States mail box, postage paid, to

ATTORNEY GENERAL OF NEBRASKA
State Capitol
1445 K Street
Lincoln, Nebraska 68509

DOUGLAS F. DUCHEK
CLINE, WILLIAMS, *et al.*
1900 First National Bank Building
Lincoln, Nebraska 68508

.....

Duly sworn to before me this
..... day of April, 1974

.....
Notary Public